statutory requirement that the Commission's rules require PEG commitments equal to those of a cable operator.[37]

A. The Public Interest Necessarily Has Local As Well As Nationwide Components.

When the Commission attempts to identify the public interests relevant to OVS PEG requirements, the Commission cannot limit its investigation to national or federal interests. The Commission must also consider, and affirmatively take into account, the interests of the various state and local jurisdictions. This imperative is reflected in the legislative history of the Act. House Report No. 104-204 states:

> In considering how to implement the capacity, services, facilities, and equipment requirements for PEG use . . . the Committee intends that the Commission give substantial weight to the input of local governments, which have long-standing and extensive experience in establishing and implementing such requirements.[38]

Congress recognized that local governments have unique expertise in the ascertainment of public needs and interests in connection with PEG requirements, and determined that such expertise should be brought to bear on the determination of the PEG obligations of OVS within the local communities.

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[37] We agree with the comments of the Alliance for Community Media et al., and the City of Dallas et al., on this issue.

[38] H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 105 (1996) ("House Report").

B. PEG Obligations for Open Video Systems Must be Established Consistent With Local Needs and Interests.

New Section 653(c)(1)(B) of the Communications Act provides that Section 611 of the Cable Act, "Cable Channels for Public, Educational, or Governmental Use," shall apply to OVS operators in accordance with regulations to be prescribed by the Commission.[39] Those regulations must ensure that OVS operators fulfill "obligations that are no greater or lesser" than the obligations contained in Section 611.[40] The legislative history relating to Section 653(c)(1)(B) makes clear that the regulations to be promulgated by the Commission to implement that section must be crafted so as to impose PEG access requirements on OVS that are "equivalent" to the obligations agreed to by cable operators.[41]

Section 611 of the Cable Act, of course, authorizes each local franchising authority to establish requirements in a franchise for the designation of channel capacity for PEG use, including institutional networks. To establish PEG requirements, each local franchising authority typically conducts an ascertainment process to determine its individual PEG access needs and interests. Once determined, these needs and interests are translated into specific requirements for facilities, equipment, and channel capacity and are incorporated into a

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[39] 1996 Act, Section 302 (adding 47 U.S.C. § 653(c)(1)(B)).

[40] Id. at § 653(c)(2)(A).

[41] House Report at 105.

negotiated franchise.[42] Such requirements may include, for example, dedicated channel capacity; upstream feeds to allow PEG programming to reach the cable headend; PEG studio and production facilities and equipment; institutional networks and related equipment.

The resulting PEG obligations are thus tailored to each individual community's needs and interests as a product of either negotiations or a formal renewal process, equitable to both the community and to the cable operator. Both the statute and sound policy require that the PEG obligations of OVS operators must likewise be tailored to each local community's needs and interests as determined by each affected local franchising authority.

C. An OVS Operator Should Be Subject To A "Match or Negotiate" Requirement: It May Choose Either To Match Each Incumbent Cable Operator's PEG Obligations, Or To Negotiate Agreements Acceptable to the Affected Communities.

OVS operators should be obligated to fulfill their statutory PEG obligations through a "match or negotiate" system. Under our proposal, an OVS operator must, as a pre-condition to certification, either: (a) agree to match the PEG obligations of each incumbent cable operator in each affected franchise area, and any future changes therein; or (b) reach agreement on an alternative arrangement with each affected franchising authority in whose jurisdiction the OVS will be. In either case, the OVS

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[42] See 47 U.S.C. §§ 531(b), 546(c)(1)(D).

operator's certification to the Commission should include a statement of the PEG requirements to be imposed by each affected community with which the OVS operator will comply. See 47 U.S.C. §§ 531, 544 and 546. Moreover, the statement of PEG requirements should bear the endorsement of each affected franchising authority.

1. Under the "match" option, the OVS operator must provide exactly what the cable operator provides.

Under the first (or "match") option, the OVS operator would simply agree to match the PEG requirements contained in the cable franchise of the incumbent cable operator in each cable franchise area covered by the OVS system. If an OVS operator chooses this option, it must also certify in its OVS application that it will match any future changes in a cable operator's PEG obligations, as may well occur when the cable operator's franchise is renewed or periodically renegotiated or modified.

Each community's PEG needs and interests are likely to change over time. Indeed, the franchise renewal process specifically contemplates that each franchising authority will ascertain each individual community's cable-related needs and interests. See 47 U.S.C. § 546. Based on the results of that ascertainment, the PEG obligations delineated in a renewal franchise may — and typically do — differ from those in the prior franchise.

This means that after an OVS system matches existing PEG obligations, if the cable operator's PEG obligations increase

under a subsequently granted renewal franchise, the OVS operator's PEG obligations must likewise increase. To conclude otherwise — that is, to refrain from requiring an OVS operator to match a cable operator's new PEG obligations — would result in the OVS operator having "lesser" PEG obligations than those of the cable operator. That would be directly contrary to the clear language of the Act. It also would do violence to the renewal provisions of the Cable Act by interfering with the community's ability to upgrade its PEG requirements as contemplated by 47 U.S.C. § 546, and would tend to produce a competitive imbalance between the cable and OVS operators. Hence, where new PEG obligations are imposed upon the incumbent cable operator, the OVS operator must be required to match those obligations as well.[43]

Logic dictates that this rationale must extend to the provision of PEG facilities as well as capacity. For example, if, based on local community needs, a franchise requires the

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[43] We suspect that LECs will argue that it would be unfair to require an OVS operator to upgrade its PEG obligations based on a renewal franchise with a cable operator that the OVS had no role in negotiating. This argument is misguided for two reasons. First, the statute requires that an OVS operator's PEG obligations be no less than those of the cable operator. But if an OVS operator is not required to upgrade its PEG obligations along with the cable operator, then it would have impermissibly "lesser" PEG obligations. Second, the Commission must remember that the LEC always has the option of being a cable operator rather than an OVS operator, thereby enabling it, like the cable operator, to negotiate PEG obligations. The advantage of OVS is that the OVS operator can, if it chooses, avoid negotiations and merely match the existing cable operator's obligations. An OVS operator should not, however, be allowed to have it both ways: the certainty and simplicity of matching while, at the same time, complaining of its inability to negotiate terms.

cable operator to provide certain PEG facilities and equipment, any OVS operator coming into that community must provide equivalent PEG facilities and equipment. Similarly, if local community needs and interests dictate that the incumbent cable operator must provide an institutional network, then any OVS operator coming into that community must likewise provide an institutional network. See 47 U.S.C. § 531. This result is entirely consistent with both the letter of new Section 653(c)(2)(A) and with the legislative history.[44] Moreover, it promotes nondiscriminatory treatment of similar providers of similar services.

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[44] In discussing the regulations to be promulgated by the Commission to implement Section 653(c)(1)(B) of the Act, the House Report states that the regulations "shall impose obligations on video platforms that are equivalent to the obligations imposed on cable operators." House Report at 105. The House Report goes on to discuss the deference that the Commission must give to local governments when the Commission endeavors to determine how to implement the "capacity, services, facilities and equipment requirements for PEG use. . ." set forth in the Act. House Report at 105 (emphasis added). This language makes clear that when drafting Section 653(c)(1)(B), Congress intended OVS operators to provide PEG facilities and equipment (including institutional networks referred to in Section 611), in addition to PEG capacity, that will be equivalent to what is required of the cable operator. Congress clearly understood that a requirement of PEG capacity without a concomitant requirement for facilities for PEG program production and transmission can render the former requirement meaningless. Channel capacity implies the means to program it.

2. Under the "Negotiate" Option, OVS Operators May Negotiate Alternative Arrangements with Communities, Which Could Result in Greater PEG Benefits for the Community and, at the Same Time, Greater Cost Efficiency for the OVS Operator.

The matching obligation of an OVS operator with respect to PEG must be cumulative with the PEG obligations of the cable operator. The PEG obligations for OVS should not, as the NPRM seems at times to suggest, be used as an excuse for halving the cable operator's PEG obligations.[45] The Act contemplates that the PEG obligations of OVS operators will be "equivalent to the obligations imposed on cable operators."[46] If the OVS operator and the cable operator were simply to share the incumbent cable operator's existing PEG obligations, the OVS operator would, by definition, be providing less PEG support than the cable operator was providing, and the cable operator would be providing less PEG support than required by its franchise. The Act cannot be construed to sanction such a "dumbing down" of PEG access.[47]

At the same time, we recognize that in some cases, it may be more practical and cost-effective to allow an incumbent cable operator and an OVS operator to have different (but equivalent), rather than identical, PEG obligations. We therefore propose

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[45] See, e.g., NPRM, ¶ 57.

[46] House Report at 105.

[47] An additional occupant of the public rights-of-way will necessarily mean more burdens and more private profits, and in any normal business arrangement will mean more rents, than the initial occupant alone. See Section V infra.

that OVS operators be given a second (or "negotiate") option in addition to the "match" option.

Under the "negotiate" option, the franchising authority and the OVS operator may negotiate PEG obligations that are not identical to those of the incumbent cable operator, but that provide an equivalent benefit to the community, provided that the franchising authority agrees to such an arrangement prior to the OVS option's certification application. For example, if the cable operator were already providing an institutional network, the OVS operator, rather than providing a second such network, might agree to provide terminal equipment for use with the institutional network, at a comparable cost. Thus, the burdens on the two operators would be the same, but the community would benefit from intelligent planning of the combined compensation.

A variation of the "negotiate" option would be to allow the franchising authority, the incumbent cable operator, and the OVS operator to negotiate a "win-win-win" solution. The two operators and the franchising authority could enter into a trilateral agreement that would result in greater PEG support than the incumbent cable operator is providing while, at the same time, costing the OVS operator and the cable operator less than simple duplicate "matching" of the cable operator's existing PEG obligations.

Thus, for example, rather than matching the cable operator by building a PEG studio duplicative of the one built by the cable operator, the OVS provider might instead agree to provide

an equivalent amount of equipment or support to the existing PEG studio, thereby strengthening the PEG programming capabilities of the existing studio facilities. Under this approach, the total PEG obligations of the two operators would be greater than the cable operator's alone, but perhaps less than a simple doubling of these obligations. And the relative PEG obligations of each operator could be proportional to the number of subscribers served by each, or perhaps to their respective revenues.

Conceivably, such an agreement could allow for the automatic adjustment of the companies' relative obligations thereunder based on changes in the number of each operator's subscribers or level of revenues. It is conceivable that under such a scheme, with the franchising authority's consent, the cost of the cable operator's PEG obligations could be decreased somewhat, particularly if the cable operator loses subscribers or revenue to the OVS competitor, while the OVS operator would not have to take on all of the burden of "matching" the cable operator's original PEG obligations.[48]

3. In the exceedingly rare case where an OVS system is located in an area where no cable operator is franchised to serve, the OVS operator must negotiate its PEG obligations with the local government.

An OVS operator's "match or negotiate" obligation should apply to any area that is within the franchise area of a cable

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[48] One possible result could be the development and expansion of independent, regional nonprofit PEG access centers, such as those already in operation in Grand Rapids, St. Louis, and elsewhere, offering economies of scale.

operator, regardless whether the cable operator has actually extended service to the area. The NPRM asks what an OVS operator's PEG obligations should be in areas where there is no incumbent cable operator.[49] Properly construed, such cases should be exceedingly rare. The number of places in the nation where no cable operator is franchised to serve (as opposed to areas where the cable operator is franchised but has not extended its system) is exceedingly small. And it seems unlikely that OVS operators would be attracted to such areas, which by definition would have been unattractive to cable operators, including LECs that otherwise could have qualified under an exception to the former cross-ownership rule.

In the exceptionally few cases where an OVS operator seeks certification in an area that no cable operator is authorized to serve, the OVS operator should be required to undertake negotiations with the local government. Of course, these negotiations may be much narrower in scope than negotiations for a cable franchise. But they will be no less important.

Negotiations between the OVS operator and the local government in such cases will be imperative because, due to the absence of any prior cable franchising process, such negotiations would be the only practical mechanism by which the community can both impart to the OVS operator the community's PEG access needs and interests, and bind the OVS operator to an obligation to fulfill those needs and interests. As suggested above, the

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[49] NPRM, ¶ 57.

Commission should require OVS operators to include in any OVS certification to the Commission the local government's endorsement of its local PEG obligations. Such a requirement will help ensure that OVS operators negotiate in good faith with the local governments.

4. The Commission should reject any proposals to average or "federalize" OVS PEG obligations across different franchising authority jurisdictions.

When considering the several alternative suggestions on the OVS PEG issues that the Commission is sure to receive, the Commission should resist any impulse to establish universal, federalized OVS PEG requirements across franchising authority boundaries, whether by averaging or by other means. As demonstrated in the discussion above, local PEG requirements must be based on the particular needs and interests of each local community, as determined by each local government.

Due to its lack of contact with local citizens and organizations, the Commission is peculiarly ill-suited to determine the PEG needs and interests of individual communities. And any OVS PEG requirements that are based on something other than each individual community's needs and interests would fail to satisfy the Act's requirements that those PEG obligations be no greater or lesser than those of the cable operators in those areas.

The Commission should likewise reject any "averaging" approach to PEG requirements across franchise areas. Such an approach would result in a "dumbing down" of PEG access,

effectively punishing those communities with the greatest demonstrated need for PEG with a system that fails to meet their PEG needs and interests.

If OVS operators were permitted to provide "one size fits all" PEG programming on open video systems that overlapped several jurisdictions, by definition that programming would not address the individual communities' distinctive PEG access needs and interests. Such a result would defeat the whole purpose of PEG access programming. Moreover, to the extent that local cable operators are providing PEG access in one or more of the effected communities, such a result would be contrary to the Act, since it would permit OVS operators to provide services not equivalent to those provided by the local cable operators. Consequently, requiring an OVS operator to fulfill the PEG requirements of each individual community served by its system is the only way to ensure that the OVS operator meets each community's PEG access needs and interests.

Thus, where an OVS will overlap several franchise areas, it should be designed with the capability to fulfill the separate PEG requirements of <u>each</u> affected community. This capability is commonly referred to as "narrowcasting." As demonstrated in the comments of the Alliance for Community Media, et al., it is neither technically difficult nor expensive for OVS operators to build systems that deliver PEG tailored to each community. Cable operators have done it with older technologies in system "clusters." OVS systems, by contrast, will be brand new. Any

suggestion that LECs would somehow be unable to accomplish with new technology what cable operators have already accomplished with older technology is nonsense.

It is important to realize that by definition, our proposed community-specific approach imposes PEG obligations on the OVS operator that are no greater or less than those imposed on the cable operators against whom they will compete. It thus encourages parity and fair competition. Moreover, any OVS operator that finds the "match or negotiate" formula unattractive always has another option: it can obtain a cable franchise and become a cable operator instead (or, for that matter, pursue other options available under the Act, such as wireless transmission). Thus, comparable PEG obligations help to ensure that both OVS and cable subscribers in the same area will be equally well served, while imposing no disadvantage on either competitor.

5. PEG channels should be provided to all subscribers.

The principal purpose of PEG channels is to provide access to electronic media for individual citizens and groups that traditionally have had no means of contributing to television programming. Such access fosters a wide diversity of information sources for the public, including important but not commercially lucrative programming; the "electronic soapbox"; participation by diverse members of the public, including minorities; and community dialogue over important issues and

events.[50] This diversity is a fundamental goal of the First Amendment of the United States Constitution.[51] This goal would be thwarted if PEG channels were not made available to all OVS subscribers.[52]

The provision of OVS PEG channels to all subscribers would be consistent with the Act's requirement that OVS operators' PEG obligations be no less than the PEG obligations of cable operators. In this respect, the OVS PEG channels (along with must-carry channels) could be part of a "basic package" similar to the basic tier on a cable system.[53]

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[50] For example, the City of St. Louis produces and cablecasts four to six town hall meetings per year, so that citizens who cannot attend the meetings can still know what was discussed. Locally produced election night coverage can make immediate information available when commercial broadcast outlets do not wish to interrupt their standard evening lineups, giving viewers additional options. Similarly, educational channels can provide important distance learning opportunities during the day and broader community education programs by night. See also attached Comments at 32-33 and Appendix A thereto.

[51] See, e.g., H.R. Rep. No. 934, 98th Cong., 2d Sess. at 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4667.

[52] "There simply is no point in requiring diverse information sources and services if a large segment of the population . . . can be denied access to that information . . .". See id. at 36, 4673.

[53] See 47 U.S.C. § 522(3). This scenario is consistent with the Commission's notion that the PEG channels do not count against the maximum one-third of capacity for which the OVS operator may select programming when carriage demand exceeds the capacity. See NPRM ¶ 19, ¶ 57 n.74. It should be noted, however, that in this case the OVS operator's programming allotment should not be one-third of the entire channel capacity: it should be one-third of the non-PEG channel capacity, since the PEG (or must-carry) capacity is an obligation of the entire system in the public interest and should not be attributed solely to the independent programmers.

6. The Commission must ensure that any equipment necessary to deliver PEG programming to local communities is made available.

In the event that special equipment is necessary for local communities to have their PEG programming distributed over the OVS, the Commission must promulgate rules that ensure that the OVS operator will provide that equipment. The failure of the Commission to require the provision of such equipment could make the availability of PEG channel capacity meaningless and preclude actual participation by most PEG producers. For example, to the extent that available system capacity may be primarily or wholly digital or compressed, it will be necessary for the OVS operator to handle conversion from the more common analog format that is more accessible (and affordable) to PEG programmers. Otherwise, the expense of conversion facilities could form as prohibitive a barrier to PEG programmers as a discriminatory denial of capacity.

Similarly, where an OVS is not capable of carrying live broadcasts, the Commission should ensure that program sources of whatever type (typically videotape) will be transposed by the OVS operator into a format that is compatible with the OVS, whether digital or analog, multicast or on-demand, tape or hard disk. Thus, PEG programming should be made available as soon as the necessary conversions can be made, as will presumably occur with any other live programming. Commission regulations must ensure that PEG programs are treated equally with other programs in scheduling such conversion.

In the short term, this means that all OVS PEG channels should be carried on analog channels, unless the franchising authority agrees to an alternative arrangement.

D. Other Title VI Provisions Must Reflect the Purposes of the OVS Provision.

In addition to the express provision for PEG access, new Section 653(c)(1)(A) provides that OVS operators will be subject to certain other Title VI provisions.

1. Program access.

The role of the program access rules (requirements of 47 U.S.C. §§ 536 and 548) in OVS is the same as with cable systems: to ensure that potential competitors can obtain the programming necessary, on the prices, terms, and conditions that are necessary, so that they can provide true competition. To the extent that the Commission's current rules achieve that end, there seems no reason not to apply them to OVS as well. After all, OVS and cable systems will at best be duopolistic competitors in video distribution. For the same reasons, OVS-originated programming should be equally available to other competing video delivery systems.

2. Negative option billing.

The Commission should be able to apply negative option billing standards (47 U.S.C. § 543(f)) without the complications introduced by the Commission's rate regulation rules in the cable context. Since all OVS services will by definition be new, there

will be no need to allow the various negative option exceptions that the Commission has allowed for the restructuring of pre-existing cable services offerings. In accordance with the purposes of the statute, the Commission's rules should focus on providing clear choices to subscribers, rather than on preserving tier structures or packages designated by operators.

E. The 'Fee In Lieu Of Franchise Fees' Paid By An OVS Operator Must Similarly Be Matched To the Local Cable Operator's Obligations.

The Act authorizes a local franchising authority or other governmental entity to require an OVS operator to pay fees in lieu of cable franchise fees, based on its gross revenues for the provision of cable service.[54] The intent of the statute is to ensure that cable systems and OVS have the same obligations in the franchise fee area as well as in PEG requirements. Thus, the statute provides that the rate at which OVS "in lieu of" fees are paid may not exceed that applied to a cable operator in the same franchise area.[55] For the same reason, as with PEG requirements, an OVS operator should be required to pay at a rate no less than that of a cable operator in the same franchise area.

To ensure that OVS and cable systems are subject to comparable obligations, the principles of 47 U.S.C. § 542 should apply here as well. Thus, for example, an OVS operator's fees should be calculated based on all revenues derived from the

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[54] See NPRM ¶ 6.

[55] 1996 Act, section 302(a) (adding new § 653(c)(2)(B)).

"operation of the [OVS] system to provide cable services." 47 U.S.C. § 542(b). That should include not only recurring subscriber revenues for programming but also, as is the case with cable operators, installation, disconnection, reconnection, change-in-service and equipment fees. It also means that, as is the case with cable operators, non-subscriber revenues related to cable service must be included as well. Examples include late fees and administrative fees; fees, payments, or other consideration that the OVS operator receives from programmers for carriage of programming on the system; advertising revenues; and revenues from home shopping and bank-at-home channels. Any other construction of the "fee in lieu of" provision would result in an unlevel playing field between the OVS operator and the cable operator.

IV. CABLE OPERATORS SHOULD NOT BE PERMITTED TO BECOME OVS OPERATORS, BUT IF THEY ARE, SEPARATE AND PRIOR LOCAL APPROVAL WILL BE NECESSARY.

A. A Cable Operator Cannot Be An OVS Operator.

As the NPRM points out, the statute draws an explicit distinction between LECs and cable operators with respect to OVS.[56] New § 653(a)(1) says: "A local exchange carrier may provide cable service . . . through an open video system that complies with this section." When referring to cable operators, on the other hand, the Act uses distinctly different language: "To the extent permitted by such regulations as the Commission

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[56] NPRM, ¶ 64.

may prescribe consistent with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an open video system that complies with this section."[57]

If Congress had intended that a cable operator could do what a LEC can do under this section — operate an OVS — Congress would have used the same term ("cable service") rather than a different term ("video programming") to describe the cable operator's permissible role in OVS. Since Congress did not do so, the only logical conclusion is that Congress envisioned that only a LEC is eligible to be an OVS operator. Thus, properly read, the Act mandates that only a LEC may operate an OVS, but a cable operator — like any other "person" — is eligible to be an independent programmer on the system, subject to Commission determination of the public interest.

The reason for this difference is evident in light of the goals of the OVS provisions. The Conference Report makes clear that the reason for OVS is to provide an additional route by which LECs may enter the video market to compete with established cable operators.[58] An incumbent cable operator, however, certainly does not need special encouragement to enter: it is

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[57] 1996 Act, section 302(a) (adding new § 653(a)(1)) (emphasis added).

[58] See Conference Report at 177 ("telephone companies need to be able to choose from among multiple video entry options to encourage entry" [emphasis added]). Cf. NPRM, ¶ 64 (overall goals of the OVS provisions include "enhancing competition and maximizing consumer choice").

already there. No purpose would have been served for Congress to allow cable operators to become OVS operators. Certainly there is no suggestion in the legislative history that OVS was cynically intended to allow a cable operator to abrogate its existing franchise obligations, which would appear to be the result of allowing a cable system to be converted to an OVS.

Thus, the statutory reference to cable operators indicates that a cable operator, like any other person, may be a programmer on an OVS, but not an OVS operator. It seems clear that Congress inserted this reference to clarify the ongoing dispute over whether a cable operator could be a programmer on a video dialtone system under the Commission's former rules. There is no need to suppose that Congress intended, absurdly, to apply entry incentives to cable operators that are already in the video market.

B. Even If the Commission Were To Conclude That A Cable Operator May Be An OVS Operator, Separate Local Community Consent Would Still Be Required.

Even if the Commission were to conclude (incorrectly) that cable operators may become OVS operators, any such FCC approval would be subject to the public interest, convenience, and necessity.[59] The Commission would certainly need to consider as part of the public interest any effect the cable operator's transition to OVS might have on the benefits the cable operator had previously agreed to provide to the community through its

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[59] See 1996 Act, section 302(a) (adding new § 653(a)(1)); NPRM, ¶ 65.

cable franchise, including franchise fees, PEG channels, facilities, and services, and the like.[60] The Commission would also have to face the issue of whether converting a cable system to an OVS would remove it from the scope of the buyout restriction in new section 652 and thus tend to reduce competition by allowing consolidation of cable and LEC systems.

One key element the Commission cannot ignore, however, is whether the affected local franchising authority has consented to a cable operator's conversion to OVS. A cable system cannot become an OVS without prior local community approval, for at least two reasons. First, unlike a LEC, a cable operator's only right to be in the public rights-of-way comes from its cable franchise. Thus, if the cable operator were to try to abandon its cable franchise to become an OVS operator, the operator would thereby forfeit its right to be in the local public rights-of-way at all, and would be subject to immediate eviction for abrogating its franchise agreement with the local community.

Second, a cable franchise is a contract between the cable operator and the local government, under which the community allows the operator to use the public rights-of-way in return for certain conditions and benefits. If the Commission were to make

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[60] See section V.B.3 infra regarding the infrastructure benefits of PEG requirements in cable franchises. Similarly, cable franchises generally require service to be extended to all parts of the community to the extent commercially feasible, and thus promote the universal service goals of the Act. The Commission could hardly condone the conversion of such a cable system to an OVS bound by no universal service requirements, which could be allowed to abandon less lucrative neighborhoods, schools, and business districts.

rules that allowed a cable operator unilaterally to abandon the local government's contractual rights under that franchise agreement, that would be a taking of the local government's property rights under contract.[61] As such, it would be vulnerable under all of the Fifth Amendment arguments set forth in section V below.

As also noted below, the short review period for OVS certification approval means that a prospective OVS operator must be required to make all the necessary showings at the time of application. Thus, any OVS certification the Commission may allow a cable operator to present must include an express agreement by each affected local franchising authority assenting to the conversion. For the reasons discussed below, it must also include an agreement between the operator and the local government authorizing use of the public rights-of-way for OVS purposes. An OVS certification without the necessary local government agreements should be considered facially incomplete and rejected.

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[61] It must be kept in mind that the conditions of franchise agreements are voluntarily agreed to by cable operators, as are the conditions of any contract negotiated for mutual benefit by two businesses. The Cable Act ensures that no cable operator can be compelled to undertake commercially impracticable obligations. See, e.g., 47 U.S.C. § 545.